

3-2011

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## Citation

GAO, Henry S.. Elephants in the Room: Challenges of integrating China into the WTO system. (2011). *Asian Journal of Wto and International Health Law and Policy*. 6, (1), 137-168. Research Collection School Of Law.

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# ELEPHANT IN THE ROOM: CHALLENGES OF INTEGRATING CHINA INTO THE WTO SYSTEM

*Henry Gao*\*

## ABSTRACT

*Since China's accession to the WTO in late 2001, one of the most intriguing questions for trade analysts has been whether the "new kid on the block" would seek to disrupt the status quo in the WTO upon its entry. This paper answers the question by reviewing China's participation in two key activities of the WTO, i.e., trade negotiations and dispute settlement, as well as another important component of global trade governance: regional trade agreements (RTAs). Drawing from an in-depth study of China's record in these activities, the author argues that, overall, China has transformed from a passive "taker" of the existing rules to a country that will "shake" the rules for its own interests or even "make" new rules, albeit at uneven paces in different areas. The paper analyzes the reasons for China's varying behavioral patterns in the three areas, and concludes by exploring China's future role in the WTO, as well as the potential ramifications of China's ascent in global trade governance.*

**KEYWORDS:** *WTO, international trade, trade negotiation, Doha Round, Free Trade Agreements, Dispute Settlement, China*

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## I. INTRODUCTION<sup>1</sup>

In an article published in 2008, Dr. Zhang Xiangchen, then Director-General of the Department of WTO Affairs of the Ministry of Commerce of the People's Republic of China (MOFCOM) and current Deputy Permanent Representative of China's WTO Mission, told the following story: "There is an English idiom: elephant in the room. A person keeps an elephant in his living room. While his visitors feel very strange about this, they choose to pretend to ignore the elephant out of respect for the host."

As the editorial for the July 2008 issue of *China WTO Tribune*—a monthly journal on trade policy officially sponsored by MOFCOM, Dr. Zhang's article was apparently not meant to entertain zoologists who study large mammals. Instead, he was referring to one of the most intriguing questions for trade analysts since China's accession to the WTO in late 2001: how would China behave once it became a formal member of the multilateral trading system? The question is two-fold. First, will China faithfully implement its WTO accession commitments? Second, will China seek to upset the existing power structure in the WTO?

As the author will demonstrate later in the article, the two questions are not entirely unrelated as the domestic implementation of commitments can well influence China's behavior in the WTO. So far, however, the first question has received the most attention from observers. In addition to abundant media coverage, official statements, and academic commentaries, the concern is well illustrated by the following passages from the Working Party Report of China's WTO Accession:<sup>2</sup>

Some members of the Working Party indicated that *because of the significant size, rapid growth and transitional nature of the Chinese economy, a pragmatic approach should be taken in determining China's need for recourse to transitional periods and other special provisions in the WTO Agreement available to developing country WTO Members*. Each agreement and China's situation should be carefully considered and specifically

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<sup>1</sup> Some of the initial findings in this paper were presented at the 2010 Annual Meeting of the American Society of International Law held in Washington, D.C. in March 2010, and the Conference on Trade Remedy, Financial Crisis and the Challenge to the WTO held in Taipei in October 2010. The author wishes to thank the participants at the two conferences for their most helpful comments. In particular, the author wishes to thank Prof. Chang-fa Lo, Carolyn Deere, Samantha Derksen, as well as the anonymous reviewer and the editorial staff of the journal for their most helpful comments. This paper is completed in August 2010 and all the cases and other information are up to date until then. All errors remain the author's own.

<sup>2</sup> WTO Ministerial Conference, Nov. 9-13, 2001, Doha, *Report of the Working Party on the Accession of China*, ¶9, WT/MIN(01)/3 (Nov. 10, 2001) [hereinafter China Accession Report].

addressed. In this regard it was stressed that this pragmatic approach would be tailored to fit the specific cases of China's accession in a few areas, which were reflected in the relevant provisions set forth in China's Draft Protocol and Working Party Report. Noting the preceding statements, Members reiterated that *all commitments taken by China in her accession process were solely those of China and would prejudice neither existing rights and obligations of Members under the WTO Agreement nor on-going and future WTO negotiations and any other process of accession . . . .* (emphasis added)

As a precaution against potential problems post-accession, the accession package includes many special rules tailor-made for China. These include substantive obligations such as the grant of national treatment to foreign persons and firms as well as foreign products (while the normal WTO national treatment obligation applies to products only),<sup>3</sup> and also the commitment to treat subsidies provided to state-owned enterprises as specific subsidies (which otherwise would not be deemed illegal under the normal WTO rules on subsidies).<sup>4</sup> There are also procedural obligations, such as the establishment of a Transitional Review Mechanism for China in addition to the normal Trade Policy Review cycle for WTO Members,<sup>5</sup> and the requirement to translate all foreign trade laws and regulations into one of the official languages of the WTO beyond the normal WTO transparency requirement.<sup>6</sup>

Moreover, concerns that China might fall short of its WTO obligations have been shared not only among WTO Memberships as a whole but have been a particular concern for the most powerful player in the WTO: the United States. For example, in the U.S.-China Relations Act of 2000,<sup>7</sup> which was enacted by the U.S. government to grant China Permanent Normal Trade Relationship (PNTR) ahead of China's accession to the WTO, the U.S. noted the following:

The record of the People's Republic of China in implementing trade-related commitments has been mixed. While the People's Republic of China has generally met the requirements of the 1992 market access memorandum of understanding and the 1992 and 1995 agreements on intellectual property rights protection,

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<sup>3</sup> World Trade Organization, Protocol on the Accession of the People's Republic of China, § 3, WT/L/432 (Nov. 23, 2001).

<sup>4</sup> *Id.* § 10.2.

<sup>5</sup> *Id.* § 18.

<sup>6</sup> China Accession Report, *supra* note 2, ¶ 334.

<sup>7</sup> U.S.-China Relations Act of 2000, Pub. L. 106-286, 22 U.S.C. § 6901 (2000) [hereinafter U.S.-China Relations Act of 2000].

other measures remain in place or have been put into place which tend to diminish the benefit to United States businesses, farmers, and workers from the People's Republic of China's implementation of those earlier commitments.<sup>8</sup>

In light of these concerns, the U.S. government established a complex mechanism under the same Act to monitor "compliance by China with its commitments under the WTO" involving the Departments of Commerce, State, and Agriculture as well as the United States Trade Representative (USTR).<sup>9</sup>

In the view of the author, however, the second issue, while relatively neglected, is more important. At the end of the day, the first issue is only about the market access commitments made by a particular WTO Member. No matter how important the underlying commercial interests or the market of the Member might be, the implementation of such commitments is still unlikely to have a major impact on the institutional foundations of the multilateral trading system as a whole. In contrast, if China were to take an uncooperative approach in the WTO, this could well affect the smooth functioning or even viability of the multilateral trading system. Will China, a long-time outsider to the international system, be a "good citizen" in the WTO, an institution that has evolved from a club-like group into an organization with great diversity and vast differences among its Members? Here again, the opinions are divided. In the lead up to China's accession, some commentators believed that China could weaken both the WTO dispute settlement system<sup>10</sup> and the decision-making process,<sup>11</sup> while others countered that, judging by China's relatively uneventful track-record in the UN and other international organizations that it has participated in, China's entry to the WTO would not be so disruptive to the *status quo*.<sup>12</sup>

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<sup>8</sup> *Id.* § 6901.

<sup>9</sup> *See id.* §§ 6943, 6951.

<sup>10</sup> For views that China's accession will over-burden the WTO dispute settlement system, see Sylvia Ostry, *WTO Membership for China: To Be or Not to Be: Is That the Answer?*, in CHINA AND THE WORLD TRADING SYSTEM: ENTERING THE NEW MILLENNIUM 257, 263 (Deborah Z. Cass et al. eds., 2003); Sylvia Ostry, *China and The WTO: The Transparency Issue*, 3 UCLA J. INT'L L. & FOREIGN AFF. 1, 9 (1998).

<sup>11</sup> For views that China's accession will weaken the effectiveness of the WTO decision-making mechanism, see for example, Richard H. Steinberg, *Institutional Implications of WTO Accession for China* (U.C. Inst. on Global Conflict & Cooperation, IGCC Working Paper No. 41, 1999), available at <http://igcc.ucsd.edu/pdf/policypapers/pp41.pdf> (last visited Feb. 27, 2011). According to Steinberg, the unique political-economic system of China and the sheer size of its economy will cause "political frictions" in the WTO upon its accession. However, due to its ineffective consensus decision-making process, it is unlikely that the WTO will be able to adopt new rules to deal with such problems. This will in turn further weaken the WTO decision-making mechanism.

<sup>12</sup> *See generally* Federick Abbott, *China's Accession to the WTO*, ASIL INSIGHT, Jan. 1998, available at <http://www.asil.org/insigh13.cfm> (last visited Feb. 27, 2011); James V. Feinerman, *Chinese Participation in the International Legal Order: Rogue Elephant or Team Player?*, 141 CHINA Q. 186 (1995); *see also* Nicholas R. Lardy, *China and the WTO*, BROOKINGS POLICY BRIEF

As China enters its tenth year of WTO Membership, has the elephant really shaken the institutional foundations of the grand mansion at Centre William Rappard? This paper will answer the question by reviewing China's participation in two key activities of the WTO, i.e., trade negotiations and dispute settlement, as well as another important component of global trade governance: regional trade agreements (RTAs). I will argue that, overall, China has evolved from a passive "taker" of the existing rules to a country that will 'shake' the rules for its own interests or even "make" new rules. At the same time, the pace of China's ascent has been uneven in different areas; the most aggressive strategy has been apparent in RTA negotiations, where China has been on a frantic shopping spree since its accession to the WTO. Similarly, while China was initially reluctant to use the multilateral dispute settlement system, it has become a major player since 2007. In terms of multilateral trade negotiations, China has been sending mixed signals: while it has made many submissions on negotiating issues in the Doha Round of WTO negotiations, China has so far successfully resisted calls from the U.S. and EU for it to play a leading role in the long-stalled trade talks. After exploring the reasons for varying behavioral patterns in a range of areas, the chapter concludes by exploring China's future role in the WTO, as well as the potential ramifications of China's ascent in global trade governance.

## II. MULTILATERAL TRADE NEGOTIATIONS

As the world's third largest economy (in terms of nominal GDP)<sup>13</sup> and trader,<sup>14</sup> China has considerable economic clout. The growing economic muscle of China has been gradually translated into elevated standings in key international institutions. While China has been a permanent member of the UN Security Council ever since it resumed its UN membership in 1971, it only recently gained more voting rights in both the IMF<sup>15</sup> and World Bank.<sup>16</sup> However, the transition seems to yet to happen at the WTO,

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SERIES NO. 9 (Brookings Inst., Washington, D.C.), Nov. 1996, [http://www.brookings.edu/papers/1996/11globaleconomics\\_lardy.aspx](http://www.brookings.edu/papers/1996/11globaleconomics_lardy.aspx) (last visited Feb. 27, 2011); Nicholas R. Lardy, *China's WTO Membership*, BROOKINGS POLICY BRIEF SERIES NO. 47 (Brookings Inst., Washington, DC), Apr. 1999, [http://www.brookings.edu/papers/1999/04china\\_lardy.aspx](http://www.brookings.edu/papers/1999/04china_lardy.aspx) (last visited Feb. 27, 2011); NICHOLAS R. LARDY, INTEGRATING CHINA INTO THE GLOBAL ECONOMY 155-57 (2002). Of course, as these international organizations have rather different objectives, functions and institutional structures than the WTO, the utility of such comparisons shall not be exaggerated.

<sup>13</sup> See The World Bank, World Development Indicators 2010, <http://data.worldbank.org/indicator/NY.GDP.MKTP.CD> (last visited Feb. 27, 2011).

<sup>14</sup> WORLD TRADE ORGANIZATION, TRADE PROFILES 2009, at 38 (2009), available at [http://www.wto.org/english/res\\_e/booksp\\_e/anrep\\_e/trade\\_profiles09\\_e.pdf](http://www.wto.org/english/res_e/booksp_e/anrep_e/trade_profiles09_e.pdf) (last visited Feb. 27, 2011).

<sup>15</sup> *IMF Reforms Give China More Power*, BBC NEWS, Sept. 18, 2006, <http://news.bbc.co.uk/2/hi/business/5358520.stm> (last visited Feb. 27, 2011).

<sup>16</sup> *China's Voting Power in World Bank Ascends to Third Place*, XINHUA NEWS, Apr. 26, 2010,

where many key players keeps complaining about China's alleged "back-seat" role. Indeed, as recently as early 2008, both the U.S. and the European Union (EU) were still reportedly frustrated over China's passive approach to the Doha Round of negotiations and the WTO's management more broadly.<sup>17</sup> Even senior Chinese officials openly acknowledge this. For example, in late 2006, Dr. Zhang Xiangchen conceded in an interview that China is only playing a "preliminary constructive role".<sup>18</sup>

While China has indeed taken a low-profile approach, this does not necessarily mean that China has made no contribution to the Doha Round. In fact, judging from the number of negotiating proposals submitted since the launch of the Round, China is one of the most active WTO Members in the negotiations. According to a study based on the official records of the WTO in 2003, China made a total of 29 written submissions to the Trade Negotiations Committee and its subsidiary bodies, the Ministerial Conference at Doha, and the working groups on the four Singapore issues. On this measure, China is the most active developing country participant and the fourth most active among all WTO Members in the Doha Round.<sup>19</sup> As of July 2008, China has submitted more than 100 proposals in the Doha Development Agenda (DDA).<sup>20</sup> These proposals are quite comprehensive and cover virtually all issues in the DDA, ranging from Agriculture and non-agricultural market access (NAMA) to Rules and Services.

Given such active participation in the actual negotiation process, why then did China choose to take a low profile in public? In the author's view, the reasons include the following, elaborated in the forthcoming text.

### **A. The Recently Acceded Member Argument**

Having been under the spotlight for 15 years in one of the longest

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available at [http://news.xinhuanet.com/english2010/china/2010-04/26/c\\_13266890.htm](http://news.xinhuanet.com/english2010/china/2010-04/26/c_13266890.htm) (last visited Feb. 27, 2011). See also Press Release, The World Bank, World Bank Reforms Voting Power, Gets \$86 Billion Boost (Apr. 25, 2010), available at <http://go.worldbank.org/WDRT2IZSE0> (last visited Feb. 16, 2011); World Bank, *World Bank Group Voice Reform: Enhancing Voice and Participation in Developing and Transition Countries in 2010 and Beyond*, DC 2010-0006/1 (Apr. 19, 2010), available at <http://siteresources.worldbank.org/DEVCOMMIT/Documentation/22553921/DC2010-006%28E%29Voice.pdf> (last visited Feb. 27, 2011).

<sup>17</sup> Scott Otteman, *Low-Key Chinese Role in Doha Trade Talks Frustrates U.S.*, EU, Jan. 2 INSIDE US-CHINA TRADE (2008).

<sup>18</sup> Shang Wu pu Shih Mao Tsu Chih Ssu Ssu Chang T'an Ju Chih: Ch'eng Chih Mao T'i Hsi I Fen Tzu (03) [Director-General of Department of WTO Affairs on China's WTO Accession: Becoming Part of the WTO System, part 3], BEIJING YOUTH DAILY, Dec. 9, 2008, available at <http://finance.people.com.cn/GB/70392/5146335.html> (last visited Feb. 16, 2011).

<sup>19</sup> Håkan Nordström, *Participation of Developing Countries in the WTO – New Evidence Based on the 2003 Official Records* 28-30 (National Board of Trade, Sweden, 2002), available at [http://www.noits.org/noits06/Final\\_Pap/Hakan\\_Nordstrom.pdf](http://www.noits.org/noits06/Final_Pap/Hakan_Nordstrom.pdf).

<sup>20</sup> Xiangchen Zhang, Wu Tzu Li Te Ta Hsiang [Elephant in the Room], 7 CHINA WTO TRIBUNE (2008), available at <http://www.wtoguide.net/Html/jsy/06122511161133998087161253268251994.html> (last visited Feb. 27, 2011).

accession negotiations<sup>21</sup> in the history of the GATT/WTO, the first explanation for China's low profile in public in the DDA is that the Chinese government wanted some quiet breathing space to digest and implement its heavy accession commitments. Indeed, China's concessions on both trade in goods and services greatly exceed those of other WTO Members, most of which have not changed since the conclusion of the Uruguay Round. As argued by Shi Miaomiao, Deputy Director-General of the Department of WTO Affairs of MOFCOM:<sup>22</sup>

In terms of industrial products, if applying the Uruguay Round modality for tariff-reduction, China would only be required to reduce its tariff from a base point of 42.7% to the final bound tariff of 32.4% in year 2004, with an average reduction by 24.1%. According to its accession commitments, however, China's tariff reduction level is much greater. In 2004, China's average tariff rate on industrial products was reduced to 9.5%. After China's fulfillment of its commitments on accession into WTO, it has reduced its tariff rate by as much as 78.9%, which is much bigger than the 33% tariff reduction commitment made by other countries during the Uruguay Round. Moreover, even if the new round of Doha negotiation concludes with a reduction rate of as much as 68.5%, the total tariff cut of China would still exceed the total tariff cut of other countries during the Uruguay Round and Doha Round combined. . . .

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. . . In terms of agriculture products, if applying the Uruguay Round modality for tariff-reduction, China would only be required to reduce its tariff from the base point of 54% to a final bound tariff of 37.9%. Instead, during its WTO Accession negotiations, China made greater concessions on reduction of agricultural tariffs. Pursuant to China's commitments, the agricultural tariff fell in 2002 to 18.5%, in 2004 to 15.6%, and by the year 2008 it will be further reduced to 15.1%. Such reductions would amount to an overall tariff reduction rate by 67.1%, which far exceeds the concession made by other members (36% for the developed Members, and 24% for the developing

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<sup>21</sup> China's dubious honor of being the WTO Member with the longest accession process has been overtaken by Russia, which is in its 17th year of accession negotiation as of 2010.

<sup>22</sup> Miaomiao Shi, *China's Participation in the Doha Negotiations and Implementation of its Accession Commitments*, in CHINA'S PARTICIPATION IN THE WTO 23, 28-29 (Henry Gao & Donald Lewis eds., 2005).



Members). Even if the new Doha Round concludes with a reduction rate on agricultural products of as high as 48%, the total tariff cut of China would still exceed the total tariff cut of other countries during the Uruguay and Doha Round combined.

Independent experts affirm this view. For example, Mattoo notes that China's services commitments are generally higher than other WTO Members in terms of both the width of coverage and the depth of market-opening. Indeed, he praises China's commitments under the General Agreement on Trade in Services (GATS) as "the most radical services reform program negotiated in the WTO."<sup>23</sup> This observation is shared by Lardy, who noted in his study of China accession package that China's commitments "far surpass those made by founding members of the WTO and, in some cases, go beyond those made by countries that have joined the organization since its founding in 1995."<sup>24</sup>

Because of its substantial accession commitments, China has been arguing that it, along with other "Recently Acceded Members (RAMs)", should not be required to make the same level of concessions as the founding WTO Members.<sup>25</sup> As the flip side of this strategy, China also tries to refrain from making aggressive demands in the negotiation and keeps a low profile in general to avoid unwanted attention from the other players.

To be fair, many WTO Members were initially sympathetic to the call for special treatments for RAMs. For this reason, the Hong Kong Ministerial Declaration explicitly states that "[w]e recognize the special situation of recently-acceded Members who have undertaken extensive market access commitments at the time of accession. This situation will be taken into account in the negotiations."<sup>26</sup> Indeed, had the DDA been concluded according to the original schedule, it is not unlikely that China could have avoided making substantial concessions on agriculture or NAMA by hiding under the "RAM" label. Unfortunately, however, as the Doha Round drags on, fewer Members are willing to give a "free ride" to Members such as China that acceded a decade ago. Moreover, the U.S. and EU face increasing pressures: on the one hand, their negotiating partners ask them to make more concessions; on the other hand, vocal domestic constituencies (such as labor and farmer groups) have been calling for the government to seek more inroads into foreign markets while avoid having

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<sup>23</sup> Aaditya Mattoo, *China's Accession to the WTO: The Services Dimension*, 6(2) J. INT'L. ECON. L. 299, 300 (2003).

<sup>24</sup> LARDY, *supra* note 12, at 104-05.

<sup>25</sup> World Trade Organization, Ministerial Conference, 5th Sess., Cancún, Statement by H.E. Mr. Lu Fuyuan, Minister of Commerce of China, at 2, WT/MIN(03)/ST/12 (Sept. 10-14, 2003).

<sup>26</sup> World Trade Organization, Ministerial Declaration of 18 December 2005, at 11, WT/MIN(05)/DEC (2005).

to provide access to their own domestic markets. Thus, they need to find another scapegoat to divert part of the attention. What could be a better target than China—the economic superpower on rapid rise? Thus, starting from 2006, the U.S. and EU have been pushing China from both sides: For example, the U.S. has repeatedly urged China, as the biggest beneficiary of the multilateral trading system, to take more responsibilities at the WTO.<sup>27</sup> Similarly, the EU has argued that China should be required to make contributions just like other WTO Members.<sup>28</sup> While the U.S. and EU use ambiguous terms such as “leadership” to describe such “responsibilities” and “contributions”, a careful reading between the lines of their messages reveals that what the U.S. and EU have in mind is really asking China to provide more concessions in key areas such as agriculture, NAMA and services so that they can have a better report card to show to their domestic stakeholders.

While China fought hard to avoid making new concessions by being recognized as a RAM, it seems that China has lost the battle. According to the latest negotiating drafts, the prevailing consensus seems to be that flexibility will be extended mostly to small, low-income RAMs and “very recently acceded Members”, i.e., those that acceded to the WTO after the Doha Round was launched.

### ***B. Lack of Expertise***

Even if China wishes to participate more fully in the WTO, as a new Member, China lacks familiarity with the rules of game and cannot participate effectively. This is the case for both substantive WTO rules as well as for procedural rules.

Regarding the substantive rules, while most important of them have been compiled in the Secretariat publication, *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations*,<sup>29</sup> there are also numerous GATT protocols, decisions, and other legal instruments that are not available in a readily-accessible format.<sup>30</sup> On top of those, as noted by the Appellate Body in *Japan – Alcoholic Beverages II*,<sup>31</sup> there are many

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<sup>27</sup> See, e.g., Susan Schwab, U.S. Trade Representative, Remarks at the 40th Anniversary Gala Dinner of the National Committee on U.S.-China Relations (Oct. 12, 2006) (transcript available at [http://www.ncuscr.org/files/2006Gala\\_SusanSchwab.pdf](http://www.ncuscr.org/files/2006Gala_SusanSchwab.pdf)).

<sup>28</sup> See, e.g., Martin Khor, *Trade: China and EU Clash over RAMs at NAMA Meeting*, #6362 SUNS, Nov. 9, 2007, available at <http://www.twinside.org.sg/title2/wto.info/twninfo110719.htm> (last visited Feb. 27, 2011).

<sup>29</sup> WORLD TRADE ORGANIZATION, *THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS* (1999).

<sup>30</sup> See General Agreement on Tariffs and Trade 1994, art. 1(a)-(c), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1, Legal Instruments – Results of the Uruguay Round, 33 I.L.M. 1125 (1994) [hereinafter GATT 1994].

<sup>31</sup> Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R,

panel reports adopted during the GATT era, which, as “an important part of the GATT *acquis* . . . create legitimate expectations among WTO Members, and, therefore, should be taken into account where they are relevant to any dispute.”<sup>32</sup> In addition, in line with the tradition of “constructive ambiguity”, many WTO rules are drafted in such a way that they are difficult to interpret for any Member, let alone newer ones. This is especially the case for rules that provide for flexibilities, which are often too technical for developing countries to master, as Deere demonstrated in her excellent study on the use of flexibilities in the TRIPS agreement.<sup>33</sup> For new Members in particular, it is a major challenge to grasp these legal rules.

Compared with the substantive rules, the procedural rules of the WTO are even more difficult for new Members to decipher. While Articles IX and X of the Marrakesh Agreement Establishing the WTO (WTO Agreement) provide a set of elaborate rules for the voting requirements for various decisions, formal voting has been rare in the history of the GATT and WTO.<sup>34</sup> In practice, most if not all decisions are made by “consensus”. But what is “consensus”? According to the footnote to Article IX(1) of the WTO Agreement, consensus is defined as the situation where “no Member, present at the meeting when the decision is taken, formally objects to the proposed decision.” However, such cryptic explanation offers little help to the uninitiated. Ironically, that is probably the reason why the consensus rule is preferred over the clearly defined and easily understood rules, such as two-thirds or three-fourths majority. To make it even more hopeless, even the consensus rule itself is of little use in reality as it applies to decision-making in formal meetings, which unfortunately is not where most decisions are made at the WTO. As acknowledged by the WTO Secretariat, “[i]mportant breakthroughs are rarely made in formal meetings of [WTO] bodies, least of all in the higher level councils. Since decisions are made by consensus, without voting, informal consultations within the WTO play a vital role in bringing a vastly diverse membership round to an agreement.”<sup>35</sup> Thus, the only way to acquire essential negotiating skills such as agenda-setting and coalition-building is through actual participation

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WT/DS10/AB/R, WT/DS11/AB/R (Oct. 4, 1996).

<sup>32</sup> *Id.* ¶ 18.

<sup>33</sup> See generally CAROLYN DEERE, *THE IMPLEMENTATION GAME: THE TRIPS AGREEMENT AND THE GLOBAL POLITICS OF INTELLECTUAL PROPERTY REFORM IN DEVELOPING COUNTRIES* (2009).

<sup>34</sup> For a review of the problems with the GATT/WTO decision-making rules, see Claus-Dieter Ehlermann & Lothar Ehring, *Are WTO Decision-Making Procedures Adequate for Making, Revising and Implementing Worldwide and 'Plurilateral' Rules?*, in *REFORMING THE WORLD TRADING SYSTEM LEGITIMACY, EFFICIENCY, AND DEMOCRATIC GOVERNANCE* 497-522 (Ernst-Ulrich Petersmann ed., 2005).

<sup>35</sup> WORLD TRADE ORGANIZATION, *Whose WTO Is It Anyway?*, in *UNDERSTANDING THE WTO: THE ORGANIZATION* 101, 104 (2008), available at [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/understanding\\_e.pdf](http://www.wto.org/english/thewto_e/whatis_e/tif_e/understanding_e.pdf) (last visited Feb. 27, 2011).

in the real work of the WTO. Unfortunately, as China did not join the WTO as a formal Member until six years after the WTO was formed, it faced a rather steep learning curve. In this regard, the 30 years of experience China had already acquired as a Member of the UN at the time it joined the WTO were not of much help either for two reasons. First, the nature of trade negotiations is very different from the political grand-standing at the UN. As one WTO official observed: “The UN is a talk-shop; the WTO is for getting real business done.”<sup>36</sup> Second, at the UN, China has been a Member of its key decision-making body—the Security Council—from the very beginning. In contrast, there is no such formal institutional arrangement at the WTO. Also, the key players in the global trade arena have been rather reluctant to grant China a seat at the table of the informal negotiating groupings for fear of diluting their own power.<sup>37</sup> While China has substantial trade volume, this by itself has not guaranteed China a position as a key player in WTO negotiations.

### *C. The Mismatch between the China-specific Provisions and the Normal WTO Framework*

In addition to the extensive market access commitments in both goods and services, China also reluctantly accepted many discriminatory clauses that are tailor-made for itself as part of its accession agreement. By their nature, these China-specific provisions are beyond the normal WTO framework. Thus, even if China acquired expertise in normal WTO negotiations, this would not solve the main problems facing China.

These provisions can be further divided into two categories: WTO-plus obligations, i.e., obligations that are beyond those normally required of WTO Members; and WTO-minus rights, i.e., rights that are less than those usually enjoyed by WTO Members.

The WTO-plus obligations include for example:<sup>38</sup>

1. The obligation to translate all foreign trade laws into one of the official languages of the WTO, while the normal transparency obligation in the WTO agreements only requires Members to publish trade laws and regulations in their own national languages.<sup>39</sup>
2. A special transitional review mechanism. Under this mechanism, China's trade policy shall be reviewed annually by the WTO since its

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<sup>36</sup> The author's interview with a senior WTO diplomat (anonymous).

<sup>37</sup> As I will note below, due to China's unique position as both a developing country and a major trader, neither the developed countries nor the major developing countries regard China as one of their own and both view China more as a threat rather than a potential ally.

<sup>38</sup> For a detailed discussion of the WTO-plus obligations, see Julia Ya Qin, “WTO-Plus” Obligations and Their Implications for the World Trade Organization Legal System: An Appraisal of the China Accession Protocol, 37(3) J. WORLD TRADE 483, 491 (2003).

<sup>39</sup> See, e.g., GATT 1994, *supra* note 30, art. X.

accession. There will be a total of nine such reviews, with the first to the eighth of such reviews conducted every year after 2001 and a final review no later than the tenth anniversary after China's accession. This obligation is in addition to the normal periodic review as mandated by the Agreement on Trade Policy Review Mechanism (TPRM), under which China would only need to be reviewed once every four years at the time of its accession.<sup>40</sup>

3. The obligation to provide national treatment to both foreign products and persons, while the WTO national treatment clauses only cover measures applicable to products.  
As to the WTO-minus rights, they include the following:<sup>41</sup>
  1. Designation of China as a "non-market economy" in anti-dumping investigations for the first 15 years after its accession, which makes it easier for investigating authorities to find the existence of dumping;
  2. The inclusion of an "alternative benchmark" methodology in subsidy and countervailing measures (SCM) investigations, which also creates biases in favor of a positive finding on subsidies, all other things being equal;
  3. A special textile safeguard mechanism (until end of 2008), and a transitional product-specific safeguard mechanism (until end of 2013). Both safeguard mechanisms substantially lowered the substantive and procedural safeguards in GATT Article XIX and the Safeguards Agreement, making it much easier for other countries to invoke safeguard measures against China while at the same time more difficult for China to challenge such measures.

As these provisions were specifically designed to soften the impact of China's WTO accession on other Members, they have a much more direct impact on Chinese exports than general WTO rules applicable to other members, at least during the transitional period. While the exact relationship between China's special provisions and the normal WTO rules is still subject to debate,<sup>42</sup> most commentators would agree that the China-specific provisions would take precedence pursuant to the principle of *lex specialis derogat legi generali* (a special rule prevails over a general rule). Thus, at least until 2017, i.e., before the expiration of these China-specific provisions, China would regard the revision of these special

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<sup>40</sup> Trade Policy Review Mechanism, Sec. C, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 3, Legal Instruments – Results of the Uruguay Round, 33 I.L.M. 1125 (1994), available at [http://www.wto.org/english/docs\\_e/legal\\_e/29-tpm.pdf](http://www.wto.org/english/docs_e/legal_e/29-tpm.pdf) (last visited Feb. 27, 2011). The frequency of review is determined according to the trade share of the Member under review. At the time of its accession, China was the sixth largest trader in the world. With its growing trade share, China is now reviewed on a biennial basis.

<sup>41</sup> For a detailed discussion of the WTO-minus rights, see generally Henry Gao, *China's Participation in the WTO: A Lawyer's Perspective*, 11 SING. Y.B. INT'L L. 1 (2007).

<sup>42</sup> For the legal problems raised by these provisions, see *id.* at 15-17.

provisions rather than the revision of the general WTO rules as a more urgent task. Unfortunately, revising the China-specific accession provisions through the WTO negotiations will be extremely hard, if not impossible. To start with, the WTO is ill-equipped for this task. Among the WTO Agreements, none contain explicit rules on how to revise the accession protocol. In practice, other than a few isolated cases of minor revisions of accession commitments,<sup>43</sup> there has been no precedent of comprehensive revisions of accession terms for particular countries. Thus, if China were to insist on revising its accession provisions, the default consensus rule would probably apply. As we have seen from the history of the WTO, consensus among all WTO members is extremely hard to come by—indeed, it is one of the reasons why the Doha Round is taking so long. More importantly, most other WTO Members are not interested in the idea of revising China's terms of accessions. Furthermore, even if assuming, *arguendo*, that China could somehow persuade other Members to accept its request to revise its accession commitments, it probably will have to provide compensation to other Members as per the current rules on the renegotiation and modification of schedules.<sup>44</sup> Such compensation will have to take the form of additional concessions to other Members beyond the commitments China made upon accession. However, as I explained earlier, it is very unlikely that China will be willing to provide such additional concessions. As I will discuss below, this factor also partly explains why China chose to take a relatively high-profile in WTO disputes and RTA negotiations.

Against this context, the recent calls by the U.S. and EU for China to shoulder more responsibility and make more concessions in the Doha Round are rather ironic: on the one hand, the U.S. and EU imposed harsh conditions on China in the accession negotiations and effectively denied China the normal membership status;<sup>45</sup> on the other hand, the U.S. and EU

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<sup>43</sup> For example, when Mongolia acceded to the WTO in 1997, it committed to phase out and eliminate its export duty on raw cashmere within ten years. Due to both economic and environmental concerns, however, Mongolia found it unable to eliminate the export duty. It requested the Council for Trade in Goods (CTG) for a five-year waiver on its accession commitment on cashmere, which was approved by the CTG on 9 July 2007. WTO, *Goods Council approves waivers for Mongolia, US*, WTO: NEWS ITEMS, July 9, 2007, [http://www.wto.org/english/news\\_e/news07\\_e/good\\_counc\\_9july07\\_e.htm](http://www.wto.org/english/news_e/news07_e/good_counc_9july07_e.htm) (last visited Feb. 27, 2011). The background of this case can be found in Damedin Tsogtbaatar, *Mongolia's WTO Accession: Expectations and Realities of WTO Membership*, in *MANAGING THE CHALLENGES OF WTO PARTICIPATION: 45 CASE STUDIES* 409-419 (Peter Gallagher et al. eds., 2005).

<sup>44</sup> See, e.g., GATT 1994, *supra* note 30, art. XXVIII; General Agreement on Trade in Services, art. XXI, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1, Legal Instruments – Results of the Uruguay Round, 33 I.L.M. 1125 (1994).

<sup>45</sup> As noted by Cattaneo and Braga in their comprehensive study on WTO accessions, while many other WTO Members which acceded to the WTO recently were also asked to assume obligations beyond the normal WTO disciplines, none of them are as onerous as those imposed on China, which remain a “particularly challenging and atypical case.” See generally Olivier Cattaneo & Carols A. Primo Braga, *Everything You Always Wanted to Know about WTO Accession (But Were Afraid to Ask)* (World Bank, Policy Research Working Paper Series 5116, 2009).

now want China to behave like a “normal” WTO Member, or even to go beyond what normal WTO Members would offer by taking up the “leadership responsibility”. Before the U.S. and EU abandon such double-standards and instead treat China on a non-discriminatory basis, why should China be expected to contribute to the Round above and beyond what is expected of a normal Member?

Moreover, as eloquently explained by Sun Zhenyu, China’s former Ambassador to the WTO, China has already made more contributions to the Round than even major developed countries. According to Sun’s statement at the Informal Trade Negotiations Committee Meeting held on August 11, 2008, which is a kind of post-mortem session after the failure of the Members to reach major breakthrough during the previous week:

We have tried very hard to contribute to the success of the round. It is a little bit surprised that at this time the U.S. started this finger pointing. I am surprised because they are now talking about cotton, sugar, rice of China as seems that we are not going to make any efforts in the Round. Let me explain what China has contributed in the round.

Because of our accession negotiations, our tariff in agriculture on average is 15.2% and now bound at this level, which is lower than the average of European Union, lower than Canada, lower than Japan, lower than quite a number of other developed countries on average. But on that basis, we are committed in this round to cut further down our tariffs, the applied tariffs deeply. And in NAMA, our average is 9%, bound at that level. And in this round, we will cut about 30% in applied level. So we are making contributions of 50% of the total developing countries in terms of applied rate cut.

. . . .

If you consider what the contributions that developed countries are going to make, in OTDS (Overall Trade-Distorting Domestic Support) the U.S. is spending \$7 to 8 billion this year or last year, maybe a little bit more to \$10 billion, but they are offering \$14.5 billion with a lot of policy space for themselves. And in their tariff cut in agriculture, they are protecting their sensitivities through sensitive products while they are saying “well even if we have sensitive products for 5 or 4% of our tariff lines, we will have TRQ (Tariff Rate Quota) expansions”. But they can never expand their TRQ to the level of China’s TRQ

quantities. In our case, our TRQ is 9 million tons for wheat, 7 million tons for corn, 5 million tons for rice. How about your quota, even after the expansion they will never pass half a million tons. Where is the new market access to the developed countries?<sup>46</sup>

In summary, because of these discriminatory clauses, China has put more efforts into softening the adverse effects of these provisions at the expense of more active participation in the Doha Round. If the major Powers in the WTO are really sincere in their calls for more responsibility by China in the DDA, they shall also not grudge at the thought of granting China a seat at the big-players table, which can only start with removing the discriminatory treatment and restoring China's legitimate rights as a normal WTO Member.

#### *D. Awkward Position on Other Issues*

Among the diversity of WTO Members, China is notable for not only the size of its economy but also its multi-faceted interests. This in turn results in different or even conflicting demands in the formulation of its trade policy. Here are two examples of such conflicts.

The first is the conflict between China's self-designated political position as a developing country and its economic standing as a major trader. For political reasons, China has always labeled itself as a developing country and joined several major developing country groups in the WTO, such as the G-20<sup>47</sup>. On the other hand, however, the fact remains that China is one of the most important traders in the world along with the major developed countries such as the U.S., EU and Japan. Thus, on many issues, China's true interests actually lie closer to those of developed countries rather than those of developing countries. Take agriculture for example. One of the major demands of developing countries is the elimination of export subsidies and reduction of domestic support. As one of the largest importers of many agricultural commodities such as wheat, cotton, and soybeans, however, China would probably find itself becoming the primary victim of the hike in world commodity price that would accompany the end

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<sup>46</sup> Sun Zhenyu, H.E. Ambassador, permanent Mission P.R.C. to the WTO, Statement at the Informal Trade Negotiations Committee Meeting (Aug. 11, 2008), *available at* <http://wto2.mof.com.cn/aarticle/inbrief/200808/20080805717988.html> (last visited Feb. 27, 2011).

<sup>47</sup> The G-20 is the coalition of developing countries pressing for ambitious reforms of agriculture in developed countries with some flexibility for developing countries (not to be confused with the G-20 group of finance ministers and central bank governors, and its recent summit meetings). It currently has 23 members, i.e., Argentina, Bolivarian Republic of Venezuela, Bolivia, Brazil, Chile, China, Cuba, Ecuador, Egypt, Guatemala, India, Indonesia, Mexico, Nigeria, Pakistan, Paraguay, Peru, Philippines, South Africa, Tanzania, Thailand, Uruguay, Zimbabwe. *See* WTO, [http://www.wto.org/english/tratop\\_e/agric\\_e/negoti\\_groups\\_e.htm](http://www.wto.org/english/tratop_e/agric_e/negoti_groups_e.htm) (last visited Feb. 27, 2011).



of subsidies by developed countries. In the area of NAMA, major developed countries have been pressing developing countries to reduce tariffs. As the “factory of the world”, China stands to gain tremendously from the reduction of industrial tariffs. However, China finds it politically difficult to request that developing countries lower their tariffs on industrial goods. Another example is trade facilitation. While many developing countries argued against inclusion of this issue in the Doha negotiating agenda—particularly early in the Round, China’s position as one of the top exporters in the world gives it a strong interest in pushing the inclusion of trade facilitation in the WTO framework to make the customs process more efficient and cheaper. On all of these issues, due to the difference between China’s political position and economic interests, it would be politically awkward for China to openly deviate from the developing country “party-line”. Thus, the best strategy seems to be to keep a low profile.

The second conflict is in the area of the WTO’s rules related to trade remedies, where China is both the biggest victim and a major user. Take anti-dumping measures for example. China has been the favorite target of anti-dumping investigations and actions for many years. According to a study by Bown, from 1995 to 2008, China was subject to 295 new anti-dumping measures, which is twice of measures against the second-frequent anti-dumping target—Korea.<sup>48</sup> Bearing in mind that Bown’s figure for China only starts from China’s WTO accession while the numbers for other countries date back to 1995, the contrast is even starker. Thus, one would think that China has an incentive to push for stricter disciplines on the use of anti-dumping in the Doha Round negotiations. At the same time, however, as one of the major users of anti-dumping actions in recent years, it also seems to make sense for China to argue that more discretion be given to the investigating authorities. Two other factors further complicate the picture. First, as noted by Messerlin, China is targeted more by developing countries than developed countries, especially if the number of anti-dumping actions is adjusted for trade size. For example, let’s say that the EU imposes one anti-dumping measure against a certain dollar amount of imports from China, then according to Messerlin’s study, India will adopt 10 anti-dumping measures while Mexico will adopt 60 such measures for the same amount of imports.<sup>49</sup> However, for fears of endangering the solidarity among developing countries and undermining the support to China by other developing countries on key political issues such as the Taiwan problem, at least in the eyes of the Chinese leadership,

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<sup>48</sup> See CHAD P. BOWN, SELF-ENFORCING TRADE: DEVELOPING COUNTRIES AND WTO DISPUTE SETTLEMENT 82 (2009).

<sup>49</sup> Patrick A. Messerlin, *China in the WTO: Antidumping and Safeguards*, in CHINA AND THE WTO: ACCESSION, POLICY REFORM, AND POVERTY REDUCTION STRATEGIES 29, 32 (Deepak Bhattacharya et al. eds., 2004).

it would not be such a good idea for China to openly confront developing countries. Second, because China is not treated as a market economy in anti-dumping investigations, it does not matter much if the general rules under the Anti-dumping Agreement are improved or not, unless, of course, China argues for the clarification of the rules on the treatment of non-market economies in the Anti-dumping Agreement. Acquiring the latter clarification would be a difficult task for two reasons: first, as very few countries are in the non-market economy club, most WTO Members would not be sympathetic to China's request; second, even if the relevant rules in the main Anti-dumping Agreement were revised, it is unclear whether or not China would ultimately benefit from this as the China-specific "non-market economy" provision is regulated by the Accession Protocol, which legally speaking is an entirely different agreement from the Anti-dumping Agreement.

As the discussions in the three sub-sections above have illustrated, China's decision to keep a low profile in the current Round actually makes great sense. Unless there are substantial changes in the factors discussed above, it is unlikely that China will voluntarily assume a leading role in the talks.

### III. MULTILATERAL DISPUTE SETTLEMENT

In contrast to its reticence in WTO negotiations, China has transformed itself from being a reluctant player into an aggressive litigant in WTO dispute settlement activities. Its roles have shifted through three stages, outlined below.

#### A. *Rule-taker*

From the time of its accession to early 2006, China took on a cautious approach towards WTO litigation. As a newcomer unfamiliar with the WTO legal rules, China put more emphasis on learning WTO rules than on winning specific disputes. In an effort to discourage litigation, China usually settled disputes quickly with the complainant once a case was filed or threatened, even if it might have had good arguments to defend its actions.<sup>50</sup> For example, in a matter concerning value-added tax rebates on integrated circuits, the U.S. made a request for consultations in March 2004, and the dispute was settled just four months later. The same period also saw China caving in only two months after the EC threatened to bring a formal WTO complaint against China's export quota regime on coke, an essential

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<sup>50</sup> For a review of China's approach towards WTO dispute settlement in this period, see Henry Gao, *Aggressive Legalism: The East Asian Experience and Lessons for China*, in CHINA'S PARTICIPATION IN THE WTO, *supra* note 22, 315.

raw material for the production of steel. The climax of this approach was reached in the Kraft Linerboard case, in which the U.S. complained of inconsistencies with the Anti-dumping Agreement when MOFCOM imposed anti-dumping duties on U.S. Kraft Linerboard imports in September 2005. On Friday, 6 January 2006, the U.S. finally threatened with a formal WTO complaint. On the next working day—i.e., Monday, 9 January 2006—the Chinese government made an announcement to scrap the anti-dumping duties in this case.

### ***B. Rule-shaker***<sup>51</sup>

To build a better understanding of the dispute settlement process, China started to actively participate as a third party in real WTO cases two years after its accession. From August 2003 to 2006, for example, China joined almost every panel established during the period as a third party. Through its participation as a third party, China gained invaluable understanding of the WTO dispute settlement system and boosted its confidence in participating in the system as a main party. Such enhanced confidence was well illustrated by the remarks of former Minister Bo Xilai of MOFCOM in May 2005. When asked whether China would bring complaints in the WTO against the countries that imposed restrictions against Chinese textile exports, Minister Bo Xilai responded:

First, China has the right to resort to WTO dispute settlement mechanism. We should not hesitate to use this right when needed. Second, while bilateral consultation has its own benefits, if each side sticks to its own view, the problem won't be solved as there is no neutral arbiter. Thus, in addition to one-to-one consultations, sometimes it's more effective to have the disputes reviewed in the multilateral setting. Third, the restrictions against Chinese products are inconsistent with WTO rules and discriminatory. We strongly oppose such measures. Of course, it's up to us to decide whether to take any legal action against such measures and when to do so.

Some of the thinkings that informed China's more-aggressive new strategy in WTO litigation are summarized in the following analysis of Mexico's litigation strategy in the Soft Drinks case<sup>52</sup> by Dr. Ji Wenhua, an

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<sup>51</sup> For a review of China's shift in strategy, see generally Henry Gao, *Taming the Dragon: China's Experience in the WTO Dispute Settlement System*, 34(4) LEGAL ISSUES OF ECON. INTEGRATION 369 (2007).

<sup>52</sup> Panel Report, *Mexico – Tax Measures on Soft Drinks and Other Beverages*, WT/DS308/R (Oct. 7, 2005), as modified by the Appellate Body Report, WT/DS308/AB/R (Mar. 6, 2006).

official in charge of dispute settlement activities at China's WTO Mission in Geneva. In the article he published in the July 2006 issues of the China WTO Tribune, Ji noted that Mexico fought an uphill battle in the case brought against it by the U.S., but made a good effort defending its case. According to Ji:

In this case, Mexico's legal position was rather *weak*, but it has made an *unrelenting* effort by raising many arguments which are *tenuous at best* and *fighting a losing battle*.

While we should not publicly *praise* such litigation strategy and attitude, this case still offers us some worthy lessons: under certain circumstances, we should try to employ some strategies, including resorting to *sophistry* and *delay tactics*.

As a respondent, we should try to come up with as many factual and legal arguments as possible. Even if such arguments are mere sophistry, or made for purposes such as creating artificial difficulties for the panel, gaining sympathies, diverting the attention of other parties, or delaying the progress of the case, they are justified so long as they serve to protect our own interest.<sup>53</sup>

Equipped with this enlightened new attitude towards the WTO dispute settlement mechanism, China has taken a markedly different approach since then. The turning point came in March 2006, when the U.S., EU, and Canada brought a joint-complaint against China in the Auto Parts case.<sup>54</sup> The complainants accused China of violating WTO obligations by treating some imported automobile parts as whole-car imports and imposes additional charge equivalent to the difference between the higher tariff for whole-car imports and the lower tariff applicable to automobile parts. Legally speaking, this is a rather simple case as the illegality of the Chinese measure seems to be quite obvious, especially as China has made specific commitments to impose no more than 10% tariff on automobile parts imports in its accession package. However, rather than continuing the old practice of settling the disputes privately, China decided this time around not to concede defeat without a good fight. Over the next two and half years, the case would go all the way from the Panel to the Appellate Body until the Appellate Body finally issued its report in December 2008.

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<sup>53</sup> Emphases original, original in Chinese, translated by the author.

<sup>54</sup> Panel Reports, *China – Measures Affecting Imports of Automobile Parts*, WT/DS339/R, WT/DS340/R, WT/DS342/R, Add.1 and Add.2 (July 18, 2008), upheld and as modified by the Appellate Body Reports, WT/DS339/AB/R, WT/DS340/AB/R, WT/DS342/AB/R (Dec. 15, 2008).

The same aggressive approach was taken in several other cases, especially the TRIPS case<sup>55</sup> and the Publications and Audiovisual Products case.<sup>56</sup> In all these cases, China tried to shake or even bend the existing rules by aggressively making legal arguments that put its position in a better light. This strategy was reflected not only in the extensive substantive legal arguments China made, but also in its sophisticated use of procedural objections. As all good lawyers know, while procedural matters may seem mundane, they are of no less importance than substantive claims: if used well, they can even save a hopeless case. Judging from its performance in these cases, China has mastered the “sophistries” very well. In the TRIPS case, for example, China attacked the complainants on such procedural grounds as the admissibility of certain evidence<sup>57</sup> and the correct scope of the measures at issue.<sup>58</sup> Similarly, in the Publications case, China’s procedural arguments included the failure of the U.S. to establish a *prima facie* case,<sup>59</sup> the evidentiary standards,<sup>60</sup> and the appropriate scope of the Panel’s terms of reference.<sup>61</sup>

### C. Rule-maker

As observed above, while China accepted some rather harsh terms as the price for its WTO accession, it is likely to be difficult for China to change these terms through the multilateral negotiation process. This has left China with only one option: trying to challenge them and soften their negative impacts through creative interpretation in WTO dispute settlement proceedings.

Among the five cases filed by China since September 2008, four (U.S. – Anti-Dumping and Countervailing Duties;<sup>62</sup> EU – Steel Fasteners;<sup>63</sup> U.S. – Tyres;<sup>64</sup> and EU – Footwear<sup>65</sup>) were aimed at changing the rules,

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<sup>55</sup> Panel Report, *China – Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, WT/DS362/R (Mar. 20, 2009) [hereinafter Intellectual Property Panel Report].

<sup>56</sup> Panel Report, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/R and Corr.1 (Jan. 26, 2009) [hereinafter Audiovisual Products Panel Report], as modified by Appellate Body Report, WT/DS363/AB/R (Dec. 21, 2009).

<sup>57</sup> Intellectual Property Panel Report, *supra* note 55, ¶¶ 6.14-37.

<sup>58</sup> *Id.* ¶¶ 7.1-19.

<sup>59</sup> Audiovisual Products Panel Report, *supra* note 57, ¶¶ 7.458-460.

<sup>60</sup> *Id.* ¶¶ 7.620-632.

<sup>61</sup> *Id.* ¶ 7.63.

<sup>62</sup> Panel Report, *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/R (Oct. 22, 2010).

<sup>63</sup> Panel Report, *European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China*, WT/DS397/R (Dec. 3, 2010).

<sup>64</sup> Panel Report, *United States – Measures Affecting Imports of Certain Passenger Vehicle and Light Truck Tyres from China*, WT/DS399/R (Dec. 13, 2010).

<sup>65</sup> Request for the Establishment of the Panel, *European Union – Anti-Dumping Measures on Certain Footwear from China*, WT/DS405/2 (Apr. 9, 2010).

especially the provisions in China's Accession Protocol. For example, in the U.S. – Anti-Dumping and Countervailing Duties case, China challenged the decision by the U.S. authorities to impose both anti-dumping and countervailing duties against several products imported from China. In addition to the usual claims under the GATT, the Anti-dumping Agreement, and the SCM Agreement, two claims made by China are particularly interesting, and are described in more detail below.

The first claim is that the U.S. violated China's Accession Protocol by failing to follow the proper methodology for the determination of the existence and amount of subsidy benefits. Under Section 15(b) of China's Accession Protocol, in subsidy investigations, other WTO Members could "use methodologies for identifying and measuring the subsidy benefit which take into account the possibility that prevailing terms and conditions in China may not always be available as appropriate benchmarks". Similar to subparagraph (a) of the same Section, which allows other WTO Members to use surrogate prices in anti-dumping investigations against Chinese firms, this provision was introduced to address the concern that prices in China do not reflect the true cost as China is not yet a full market economy. However, unlike the non-market economy (NME) status in anti-dumping investigations, which is scheduled to expire 15 years after China's accession, the alternative benchmark methodology does not have an expiration date. Thus, theoretically speaking, the alternative benchmark methodology could be invoked even 100 years after China's accession to the WTO. As discussed above, it would have been very hard for China to try to change this provision in its accession terms through negotiations in the WTO. Instead, China decided to limit the applicability of the provision by giving teeth to some seemingly innocuous terms in the provision: first, China alleged that the U.S. failed to make a finding that there were "special difficulties" in applying the prevailing terms and conditions in China as the basis for the determination of the existence of benefits; and second, China alleged that the U.S. failed to notify the SCM Committee of the methodologies it used. This is a very clever way to try to reduce the utility of the provision. It remains to be seen how the Panel would rule in this case as the Panel has not issued its report at the time of the completion of this article. However, if the Panel indeed chooses to give a strict interpretation of the term "special difficulties", this might greatly reduce the attractiveness of the provision and even effectively render it void.

The second claim is that the U.S. violated the relevant provisions in the Anti-dumping and Safeguards Agreements through its dual application of both anti-dumping and countervailing duties against the same products. While the same product may be subject to both anti-dumping and SCM investigations, in practice, the U.S. have always avoided the imposition of both anti-dumping and countervailing duties for the same product if they

are imported from market economies. However, non-market economies do not receive the same treatment and may be subject to both anti-dumping and countervailing duties. Under Article VI.5 of the GATT, WTO Members are prohibited from applying both anti-dumping and countervailing duties to the same products in the same case. However, the same provision also states that the prohibition of dual application only applies to cases of export subsidies and does not include actionable domestic subsidies, thus inapplicable to the alleged subsidies to Chinese products. On the other hand, one may also argue that to the extent that the dual application results in over-compensation, this might result in inconsistencies with the “lesser duty rule” under both the AD and SCM Agreements. In summary, the rules as they currently stand are unclear. Therefore China hopes to clarify the rules or even make new rules through this case. As the expiration date for non-market economy status in anti-dumping investigations draws closer, subsidy investigations will become the main problem facing Chinese firms. Hopefully, through the clarification of these terms in dispute settlement activities, China will be able to change the rules in its favor so that its firms will have an easier time when this issue arises in the future.

Similarly, both the tires safeguard case against the U.S. and the two anti-dumping cases against the EU involve claims of violation of the individual clauses authorizing the respective trade remedy measures in China’s Accession Protocol. Given that the panel and Appellate Body have not been particularly fond of trade remedy measures, there is a good chance that the ambiguous terms used in the Accession Protocol be interpreted in a way that would restrict the utility of these provisions in the future. Should this be the case, China would have effectively changed the rules through WTO dispute settlement process.

In summary, the past nine years have witnessed China adopting shifting strategies in WTO dispute settlement system: starting as a newcomer that largely passively “took” obligations and commitments imposed upon it, China has transformed into a seasoned Member that skillfully “shook” the existing rules to tilt in its favor, and now even a shrewd player that attempts to “make” new rules reflecting its own interests by advancing strategic claims in dispute settlement. If the current trend continues, China will not only continue to be a heavy “user” of the system, but also eventually become an “owner” of the system.

#### **IV. REGIONAL TRADE AGREEMENTS**

Strictly speaking, RTAs exist in their own universe parallel to the multilateral trading system. However, as they cover increasingly more

global trade,<sup>66</sup> they have become an important component to global trade governance. Moreover, for most WTO Members, the WTO and RTAs are two alternative tracks that they will pursue at different times. Thus, in order to have a complete picture of China's position in global trade governance, I will also briefly discuss China's RTA approach here.

While China is now an active player in WTO dispute settlement, it still took more than five years for it to initially "warm up". In contrast, China did not waste any time in negotiating RTAs. Starting with the ASEAN-China FTA in 2002, China has been busy negotiating RTAs covering both trade in goods and services. The subsequent years witnessed the signing of the two Closer Economic Partnership Arrangements with Hong Kong, China (June 2003)<sup>67</sup> and Macau, China (October 2003),<sup>68</sup> respectively; the FTAs with Chile (November 2005),<sup>69</sup> Pakistan (November 2006), New Zealand (April 2008), Singapore (October 2008), Peru (April 2009), Costa Rica (April 2010); the launch of FTA negotiations with the Gulf Cooperation Council (April 2005),<sup>70</sup> Australia (May 2005),<sup>71</sup> Iceland (April 2008),<sup>72</sup> and Norway (September 2008);<sup>73</sup> and with negotiations soon to begin with the South African Customs Union.<sup>74</sup>

While political considerations seem to override economic benefits in many of these RTAs, China has also been trying to make new rules through them.<sup>75</sup> These rule-making efforts cover both the structural aspects and the substantive rules of RTAs.

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<sup>66</sup> For example, according to Baldwin and Carpenter, more than half of world trade is conducted under the preferential tariff regimes under RTAs rather than the MFN regime under the WTO. See Theresa Charpenter, *A Historical Perspective on Regionalism*, in *MULTILATERALIZING REGIONALISM: CHALLENGES FOR THE GLOBAL TRADING SYSTEM* 13, 25 (Richard Baldwin & Patrick Low eds., 2009).

<sup>67</sup> Mainland and Hong Kong Closer Economic Partnership Arrangement, P.R.C.-H.K., Dec. 27, 2003, [http://www.tid.gov.hk/english/cepa/legaltext/cepa\\_legaltext.html](http://www.tid.gov.hk/english/cepa/legaltext/cepa_legaltext.html) (last visited Feb. 27, 2011).

<sup>68</sup> Mainland and Macau Closer Economic Partnership Arrangement, P.R.C.-Mac., 2003, <http://www.worldtradelaw.net/fta/agreements/chinmacaofta.pdf> (last visited Feb. 27, 2011).

<sup>69</sup> Free Trade Agreement Between the Government of the People's Republic of China and the Government of the Republic of Chile, P.R.C.-Chile, Nov. 18, 2005, [http://www.direcon.cl/documentos/China2/tlc\\_chile\\_china\\_ing\\_junio\\_2006.pdf](http://www.direcon.cl/documentos/China2/tlc_chile_china_ing_junio_2006.pdf) (last visited Feb. 27, 2011).

<sup>70</sup> See Ministry of Commerce of the People's Republic of China Department of International Trade and Economic Affairs, *China Completed First Round of FTA Negotiations with Six Gulf States*, <http://gjs.mofcom.gov.cn/aarticle/af/ak/200505/20050500088391.html> (last visited Feb. 27, 2011).

<sup>71</sup> Austl. Dep't Foreign Affairs & Trade, *Australia-China FTA Negotiations*, SUBSCRIBER UPDATE, May 26, 2005, [http://www.dfat.gov.au/geo/china/fta/050526\\_subscriber\\_update.html](http://www.dfat.gov.au/geo/china/fta/050526_subscriber_update.html) (last visited Feb. 16, 2011).

<sup>72</sup> China FTA Network, Free Trade Agreements under Negotiation: China-Iceland FTA, <http://fta.mofcom.gov.cn/topic/eniceland.shtml> (last visited Feb. 27, 2011).

<sup>73</sup> China FTA Network, Free Trade Agreements under Negotiation: China-Norway FTA, <http://fta.mofcom.gov.cn/topic/enorway.shtml> (last visited Feb. 27, 2011).

<sup>74</sup> China FTA Network, Free Trade Agreements under Negotiation: China-SACU FTA, <http://fta.mofcom.gov.cn/topic/ensacu.shtml> (last visited Feb. 27, 2011).

<sup>75</sup> For a detailed discussion of China's FTA strategy, see generally Henry Gao, *The RTA Strategy of China: A Critical Visit*, in *CHALLENGES TO MULTILATERAL TRADE: THE IMPACT OF BILATERAL, PREFERENTIAL AND REGIONAL AGREEMENTS* 53 (Ross Buckley et al. eds., 2008).



First, in terms of the structure, China's RTAs tend to have a narrower coverage than those used by other major players, such as the U.S., EU, or Japan. Normally, China would start with an agreement on trade in goods alone and would expand to services only after commitments on goods have been substantially implemented. Take the FTA with Pakistan, for example, while the liberalization of trade in goods dates back to the signing of agreement on the Early Harvest Program in April 2005, the agreement on trade in services was only signed in February 2009. Similarly, in the FTA with ASEAN, the agreement on trade in goods was signed in November 2004, while the agreement on services was only signed in January 2007. A reverse example is the FTA negotiation with Australia, which has languished for years partly due to the fact that Australia insists on dealing with services liberalization first while China wishes to proceed with the usual "goods and then services" order. With regard to the issues which are not traditionally trade-related, such as environment protection, competition policy, and labor standard, China has been reluctant to include them as part of the FTA package. Recently, however, China has shown some willingness to include these issues as part of the FTA package. Nonetheless, in line with its cautious approach, China has largely chosen not to include these issues in the main agreement of the FTA, but preferred to address them in stand-alone side agreements or MOUs.

Second, with regard to the substantive rules, China has insisted on the recognition of its market economy status by potential RTA partners as a pre-condition for virtually every RTA that it has signed. As mentioned earlier, in its accession package, China has agreed to be treated as a non-market economy. This makes it easier for other countries to find the existence of dumping in anti-dumping investigations against China. Given the structural problems in the WTO decision-making process, it is difficult for China to change its non-market economy status in the multilateral trading system. The remaining option is for China to negotiate with each of its trade partners to recognize China's market economy status. Because China has much more bargaining power at the bilateral/regional level, this strategy seems to be working. As of the end of 2009, 79 economies have recognized the market economy status of China.<sup>76</sup> As more and more economies recognize China's market economy status, there would be mounting pressures on those who still deem China as a non-market economy to accept China's market economy status as an established precedent. When enough WTO Members have recognized China's market economy status, the non-market economy status clause in the Accession Protocol will be effectively eliminated.

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<sup>76</sup> Online Interview of Zhou Xiaoyan, Director General of Bureau of Fair Trade, MOFCOM (Dec. 31, 2009), [http://gzly.mofcom.gov.cn/website/face/www\\_face\\_history.jsp?desc=&p\\_page=2 &sche\\_no=1515](http://gzly.mofcom.gov.cn/website/face/www_face_history.jsp?desc=&p_page=2 &sche_no=1515) (last visited Feb. 27, 2011).

It's interesting to note that the launch of China's FTA initiative coincided with its accession to the WTO. In the view of the author, this at least partially reflects China's dissatisfaction with its perceived "second-class citizen" status in the WTO. As the author argues earlier in the paper, while China is unhappy with the discriminatory clauses, there is little chance that they could be modified within the WTO framework. In contrast, FTA negotiations provide China with an alternative slate to remove some of these provisions, make new rules, and even formulate new templates that might help change the landscape at the WTO.

## V. CONCLUDING THOUGHTS

As we can see from the discussions above, China has gradually emerged on the central stage of the multilateral trading system, albeit at an uneven pace in different settings: in the DDA negotiation, China has so far kept a low public profile even though it has made some interesting submissions behind the scenes; in WTO dispute settlement, China has transformed from a country that shunned litigation at all cost to one that actively uses the system to defend its interests; in FTA negotiations, China has been one of the most active players in Asia since its accession to the WTO in 2001.

Looking into the future, it is very likely that China will become an increasingly active player in global trade governance. At the same time, given its diverse interests, China's degree and style of engagement on different aspects of global trade governance will probably vary.

First, in WTO negotiations, if the Doha Round ever concludes and a new round is launched, we will probably see a more active China at work. This will not only be the result of China's rising economic clout, but will also reflect China's growing prowess in international diplomacy. While no indicator can accurately quantify a country's negotiating prowess, the number of submissions made in the negotiations can serve as a useful proxy.<sup>77</sup> China did not make any submission in the Doha Round until 20 June 2002, when China made a proposal on fisheries subsidies.<sup>78</sup> By February 2005, China has made more than ten submissions.<sup>79</sup> The number further jumped to 67 in December 2007. By the time of the July 2008 meeting, China had made more than 100 submissions concerning the Doha Round. Judging from the rapidly increasing number of submissions, China

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<sup>77</sup> Nordström, *supra* note 19, at 12.

<sup>78</sup> China Society for World Trade Organization Studies, *Chung Kuo Ts'an Yü To Ha Hui Ho T'an P'an Ta Shih Chi [Major Milestones in China's Participation in Doha Round Negotiations]* (2009), <http://cwto.mofcom.gov.cn/aarticle/c/200910/20091006574682.html?1126026260=872534836> (last visited Feb. 27, 2011).

<sup>79</sup> Guangsheng Shi, *Working Together for a Better Future Based on Mutual Benefit*, in CHINA'S PARTICIPATION IN THE WTO, *supra* note 22, at 15, 21.

has been learning very fast. Moreover, China itself will be more willing to participate in new multilateral trade negotiations as by then most of its discriminatory accession provisions would already have expired.

Second, in WTO dispute settlement, we should expect more cases involving China as either respondent or complainant. In part, this would simply continue established patterns in the WTO: over the history of the GATT/WTO, it is rare to find cases where the two largest Members—i.e., the U.S. and EC—are not involved in, in some capacity. It is only natural that we would find China, the next big trader, pursuing and/or receiving the same treatment. On the other hand, as some of the past cases illustrate—such as the audiovisual case, the subsidies case, and the ongoing debate on China's currency policy<sup>80</sup>—many of the China's trade disputes are not just the old-fashioned clash between the giants that we have seen in the case of disputes between the U.S. and the EU. Instead, they reflect the inherent tension between the economic and political systems of China and the fundamental principles of the WTO, which were designed by and for economies that operate in vastly different environments. Will China work to change the existing rules in its favor through the WTO dispute settlement mechanism? This seems unlikely. As we have seen in our previous discussion, while China has been trying to change some of the rules, they are almost exclusively terms that it finds discriminatory against itself, rather than general WTO rules.

Third, in the short to medium-term future, we will probably see China's RTA frenzy waning down for the following reasons. First, the non-market economy status clause in China's Accession Protocol will expire in 2016, leaving China with no need to reward countries with RTAs just for the sake of recognizing its market economy status. Second, if one looks around, it is evident that most countries that are willing to negotiate RTAs with China have already done so, making it harder to find new candidates. Third, as the recent protests against China in Malaysia and Indonesia<sup>81</sup> have shown, there might be backlash against China when the RTA commitments kick in. The complicated political consequences of China's RTAs, whose full implications remain to be seen, will probably make China more cautious in pursuing future RTAs.

As history has shown, no international institutions can survive for long

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<sup>80</sup> For the complicated issues raised by the currency dispute, see, for example, THE US-SINO CURRENCY DISPUTE: NEW INSIGHTS FROM ECONOMICS, POLITICS, AND LAW, especially *Section 5: Does the Crisis-era Renminbi Regime Violate WTO Rules? Is the Threat of WTO Litigation Credible?* (Simon J. Evenett ed., 2010), available at [http://www.voxeu.org/reports/currency\\_dispute.pdf](http://www.voxeu.org/reports/currency_dispute.pdf) (last visited Feb. 27, 2011).

<sup>81</sup> Yuli Tri Suwarni, *Thousands Rally to Demand Delay of ASEAN-China FTA*, JAKARTA POST, Jan. 7, 2010, available at <http://bilaterals.org/spip.php?article16567> (last visited Feb. 27, 2011); *Malaysia Government will address concerns over surge in imports from China*, NAM NEWS NETWORK, Feb. 12, 2010, <http://bilaterals.org/spip.php?article16786> (last visited Feb. 27, 2011).

without the support of the key players. As the biggest emerging power in the world today, China deserves a seat at the big-boy's table. While the other major powers, such as the U.S., EC and India might feel uneasy, they have to realize that recognizing a larger role for China in global trade governance also suits their own interests and those of the multilateral trading system as a whole. While the WTO, unlike its sister institutions, does not have any formal "high-table", it is an open secret that many key decisions are made in informal processes such as the green room which extends invitation only to the key players. If China were denied the chance to play the game that the major powers have been playing, it might well decide to make its own game. Of course, one might have doubts as to whether the "golden straightjacket" of multilateral trade rules, initially made for the medium-sized average WTO Members, could constrain an XXXL-size country like China. But such concerns are probably unwarranted as China has largely been a system-maintainer in the WTO. In short, while China's ascent in global trade governance might raise some feelings of uneasiness, the best way to ease such concerns is greeting it with more mutual understanding and accommodation, rather than reacting with simple fear and suspicion.

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